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NO. 59614-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

EMIRA RESULOVIĆ,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF APPELLANT

Ann Pearl Owen, WSBA #9033
2407-14th Avenue South
Seattle, Washington 98144
(206) 624-8637

Attorney for Emira Resulović, Appellant

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I. INTRODUCTION

Emira Resulović, a recent immigrant who is not fluent in English [hereinafter called LEP for "limited English proficiency"], was injured while employed. Ms. Resulović appeals the Superior Court's judgment affirming a decision of the Board of Industrial Insurance Appeals [Board] affirming decisions of the Department of Labor & Industries [Department] and awarding attorney fees and interest against her.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The Superior Court erred by finding Ms. Resulović's Board appeals were untimely. [Error No. 1]

2. The Superior Court erred in finding Ms. Resulović's constitutional rights were not violated. [Error No. 2]

3. The Superior Court erred by approving the Department's failure[1] to provide Ms. Resulović interpreter services[2] and its issuance of written communications and orders in English only. [Error No. 3]

4. The Superior Court erred by affirming the limitations on the interpreter services provided at the Board and denial of reimbursement for

[1] When used in this brief, the terms "fail" and "failure" include the refusal to do something and the denial by action, if not by words, to do the thing which has not been done. Likewise, when used in this brief the terms "refuse" and "deny" include action which constitutes the failure to do something.

Ms. Resulović's interpreter services. [Error No. 4]

5. The Superior Court erred by failing to award attorney fees and costs to Ms. Resulović. [Error No. 5]

6. The Superior Court erred in awarding the Department attorney fees and interest against Ms. Resulović. [Error No. 6]

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did Ms. Resulović file her Board appeals within 60 days of first being first informed of the content of the Department orders? [Error No. 1]

2. Did any Department's order contain "black faced type" as required by RCW 51.52.050? [Error No. 1]

3. Did the Department "communicate" its orders to Ms. Resulović as required by RCW 51.52.050? [Error No. 1]

4. Should equity be exercised on Ms. Resulović's behalf to find her appeals timely? [Error No. 1]

5. Was the Board required to address constitutional issues raised by Ms. Resulović's notices of appeal? [Error No.2]

6. Did the Board have jurisdiction over the Department's decision to issue orders in English only to Ms. Resulović? [Error No. 3]

7. Did the Superior Court err by denying Ms. Resulović reimbursement for interpreter costs incurred in discovery? [Error No. 3]

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[2] The term "interpreter services" and "interpretation" refers not only to oral interpretation

8. Does the Industrial Insurance Act [the Act] require communications with LEP injured workers in their primary language or through free interpreter services? [Errors No. 3 & 4]

9. Does Washington public policy require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

10. Does RCW 2.43 require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

11. Does Washington's Law Against Discrimination require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

12. Do Due Process or Equal Protection require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

13. Does Executive Order 13166 require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

14. Does Title VI of the Civil Rights Act of 1964 require communications with LEP injured workers in their own language or

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but also to written "translator services" and "translation."

through free interpreter services? [Errors No. 3 & 4]

15. Is an LEP injured worker entitled to communicate confidentially with counsel during Board appeals? [Error No. 4]

16. If the Board and Department communicate in English only with an LEP injured worker and do not provide interpreter services, is the LEP worker to be reimbursed for interpreter expenses? [Errors No. 3 & 4]

17. Is an injured worker entitled to attorney fees and costs under RCW 51.52.130 and *Brand* if she prevails on any issue? [Error No. 5]

19. Does it violate the Act to award attorney fees and interest to the Department against the worker at the Superior Court? [Error No.6]

III. STATEMENT OF THE CASE

A. FACTS PROVEN AT BOARD HEARING ON LANGUAGE ISSUES.[3]

Emira Resulović was born in Bosnia. Due to the war there, she moved to Germany where she met and married another Bosnian and where their daughter was born. 8/17 TR 8-11, 20. Soon after their 1995 arrival in the United States, she began working. She was working when injured in late 1999. 8/17 TR 11-13.

Both Ms. Resulović and her husband grew up speaking Bosnian and can neither read nor speak English. 8/17 TR 8, 62. Without

[3] References to the Certified Board Record appear as CBRA followed by page numbers. References to transcripts of Board proceedings appear as TR preceded by the month

interpreter services, she cannot communicate in English.[4] The Department knew this because she required an interpreter for a claim manager phone interview in February of 2000. 8/17 TR 14. Despite this, the Department 1) sent her all paperwork in English without providing interpreter services and 2) never informed her of her rights or responsibilities under the Act in her language. 8/17 TR 15. The Department never told her she had to appeal its decisions in any given period of time. 8/17 TR 15. Sometimes she had to pay for an interpreter for medical care when the Department failed to provide or pay for one. 8/17 TR 63-64.

Jill Grigsby, her claim manager, cannot speak Bosnian or assess English fluency. 8/17 TR 23-24. It was her responsibility to issue orders on the claim. 8/17 TR 24-25. Knowing Ms. Resulović lacked English fluency, she authorized interpreter services for medical and vocational services and independent exams. 8/17 TR 31, 58.

Ms. Grigsby neither requested any Bosnian translations nor sent any communications to Ms. Resulović in Bosnian. 8/17 TR 25. Further she never authorized any interpreter to translate any Department letter or order for Ms. Resulović. 8/17 TR 28-29. The Department's authorization for interpreter services did not allow interpretation of Department orders.

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and day and followed by page numbers. References to Exhibits in the CBRA appear as EX followed by the exhibit number.

[4] The IAJ expressly acknowledged she only speaks Bosnian at 8/17 TR 13.

8/17 TR 33. She issued the closing order without considering having it translated into Bosnian. 8/17 TR 30. She never personally informed Ms. Resulović that she could appeal any Department's decisions. 8/17 TR 32.

Ms. Grigsby never told Ms. Resulović that she had a right to know in her own language what her rights under the Act were. 8/17 TR 34. Nothing in the Department claim file indicates Ms. Resulović was ever informed in Bosnian of her responsibilities under the Act or any appeal time limits. 8/17 TR 34-35. The Department never communicated the wage order or the claim closure order to Ms. Resulović in Bosnian orally or in writing. 8/17 TR 35-36. The Department never provided her any benefit claim forms in Bosnian. 8/17 TR 36.

The Department has forms, orders, and brochures available in Spanish and English, but in no other languages. 8/17 TR 25-26. Department policy is not to deny workers the codes needed to use its phone interpreter service. 8/17 TR 29-30.

B. FACTS PROVEN ON WHEN INFORMED OF CLAIM ORDER CONTENTS.

Emira Resulović first learned that the Department closed her claim and that she had a right to appeal the Department's actions when she saw her physician regarding an industrially related psychiatric condition for which she sought treatment. This was "immediately" before she first met her attorney and instructed her attorney to appeal. The very next day,

January 19, 2005, her notices of appeal to the Board were filed. 8/17 TR 15-17, CBRA 86-90, 134-138, Department Orders, **Appendices A & B**.

C. DEPARTMENT ACTION

The Department accepted Ms. Resulović's claim, issuing all orders and written communications in English only. The Department knew she needed interpreter services to communicate effectively in English from a long phone interview the claim manager had with Ms. Resulović through an interpreter. 8/17 TR 14-15. After that, the Department issued additional orders on the claim all of which were in English only, including the closure order claim issued February 20, 2004. CBRA 90-91.

Ms. Resulović appealed the wage calculation order and the order closing her claim. CBRA 134-138. Both her Board appeals stated they were timely because the Department orders were not communicated in the language she understood -- Bosnian. CBRA 89, 137.

Appealing the closure order, she sought psychiatric care [needed due to her industrial injury] and interpreter services. CBRA 86-87. On the other, she requested recalculation and interpreter services. CBRA 134.

Both notices stated her LEP status. Both requested relief, citing RCW 2.43, RCW 49.60, Title VI of the Civil Rights Act, the Washington State Constitution and the Department pronouncement that immigrants would be treated equally with nonimmigrant workers. CBRA 88, 236.

D. BOARD ACTION

The Board accepted Ms. Resulović's appeals subject to proof of timeliness. CBRA 91, 139. The Department prepared requests for admission regarding attached documents. Both requests and appended documents were provided in English only without any Bosnian translation. EX 7. Before serving the requests, the Department moved to require Ms. Resulović to respond on shortened time because less than 30 days remained before the timeliness hearing. CBRA 108-110. Ms. Resulović requested interpreter services to allow her to respond to the requests. CBRA 115-116. The IAJ held a conference on the matter noted for July 15, 2005. CBRA 120. The Board Record is devoid of any transcript of that conference or the IAJ's oral ruling that Ms. Resulović must respond to the requests without either the Board or Department providing interpreter services. The IAJ continued the hearing for discovery. CBRA 121.

The IAJ issued a Proposed Decision and Order [PD&O CBRA 73-84], ruling that the Board could not exercise equity under any fact pattern not pre-approved by the Courts. The IAJ then refused to exercise equity, holding the appeals were untimely under "*stare decisis*." CBRA 83.

Ms. Resulović filed a Petition for Review to the full Board. CBRA 41-71. Two of the three members of the Board issued a Decision and Order [D&O CBRA 1-5] dismissing the appeals as untimely, stating:

> We reject [the] contention that the word "communicated", as used in RCW 51.52.060 requires that she receive information contained in Department orders in her native language Bosnian/Serbo-Croatian. The word "communicated" contained in RCW 51.52.060 requires only that a copy of the order be received by the worker. [CBRA 2-3.]

The Board held, despite acknowledging the fact she was only fluent in Bosnian, Ms. Resulović had not timely appealed based on two findings without supporting evidence in the record:

> Finding No. 2 that the orders contained "black faced . . . type on the same side as the decision" [CBRA 3] and
>
> Finding No. 4 that she did not seek translation of the orders and did not appeal "within 60 days after her physician told her that his bills had not been paid and that she had to appeal." [CBRA 4]

The D&O failed to address constitutional rights; rights under RCW 2.43, RCW 49.60, and Title VI; and interpreter services right at the Department level. Ms. Resulović timely appealed to the Superior Court.

E. SUPERIOR COURT ACTION

The Superior Court entered judgment for the Department awarding an attorney fee and interest. CP 1-3. It amended Finding of Fact 4 omitting the finding Ms. Resulović did not appeal "within 60 days after her physician told her that his bills had not been paid and that she had to appeal." CP 5. Despite finding the Department provided no interpreter services on appeal, the Superior Court held Ms. Resulović's appeals were untimely. CP 2-3, 5-6 A timely appeal to this Court ensued. CP 7-14.

IV. ARGUMENT

Six assignments of error have been made. Argument is organized according to these assignments of error. Issues are addressed in turn.

A. STANDARD OF REVIEW.

This Court reviews statutory interpretation as a question of law *de novo*. *Stucky v. Department of Labor & Industries,* 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Issues of fact are reviewed for "substantial evidence to support them." Substantial means evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the finding. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Conclusions of law are reviewed to see if they flow from the findings of fact. *Grimes v. Department of Labor & Industries*, 78 Wn.App. 554, 897 P.2d 431 (1995).

B. INTERPRETATION: LIBERAL CONSTRUCTION IN WORKER'S FAVOR

1. The Industrial Insurance Act Must be Liberally Construed to Reduce Worker Suffering & Economic Loss.

RCW 51.12.010 requires the Industrial Insurance Act be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from [industrial] injuries."

2. Ambiguities Must be Interpreted in Worker's Favor.

On issues of law, the Court must interpret any ambiguities in the Act in favor of the injured worker, despite a contrary interpretation

by the Department, the Board, or the Superior Court. *Cockle, infra.*

C. THE SUPERIOR COURT ERRED FINDING THAT MS. RESULOVIĆ'S APPEALS WERE UNTIMELY.

1. The Department Orders Violated Two of Three Requirements Imposed by RCW 51.52.050 and are, Therefore, Not Final.

RCW 51.52.050 states that whenever DLI has made a final order or decision, the copy sent to the worker:

> ...shall bear on the same side of the same page on which is found the amount of the award, a statement, set in **black faced type** of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is **communicated** to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board .... [Emphasis added]

Thus, RCW 51.52.050 requires the Department to do three things before any order may become final and before it sparks the 60-day appeal period under RCW 51.52.060:

a. State appeal rights on the order in "black faced type,"
b. Communicate the order to the injured worker, and
c. Provide a copy of the order to the injured worker.

The Department failed to accomplish either of the first two requirements, vitiating the effectiveness of having sent the worker a copy of the order. For this reason, the Department orders on appeal were invalid, failed ever to become final, and failed to require the filing of an appeal upon receipt.

a. The Appeal Notice Stated in the Orders Violated the "Black Faced Type" Requirement of RCW 51.52.050.

The meaning of term "black faced" type is neither obvious nor defined in the Act, necessitating interpretation. Looking to the dictionary definition is appropriate to ascertain the common, ordinary meaning of an undefined term. *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994).[5]

Dictionaries show the term "black faced" is synonymous with "bold faced." The Random House Unabridged Dictionary, 2nd Ed. (1993) defines "black face" first in theatrical terms and secondly referring to print as "2. *Print.* A heavy-faced type." Similarly, Webster's Third New International Dictionary (1986) defines "black face" first as a type of sheep, then in theatrical terms, and finally as: "3. BOLDFACE."

It is obvious that the Legislature used the term "black faced" to require boldface type to assure the worker's attention is drawn to the appeal deadline. This aim was not met here because the orders sent to Ms. Resulović contain no "black faced" (*i.e.* bold face) type when stating the appeals rights information. See **Appendices A & B.**

The function of such "black faced" type is especially, one might say crucially, important when the orders deal with persons unable to

[5]"When the common, ordinary meaning is not readily apparent, it is appropriate to refer to the dictionary."

comprehend the language in which the order is sent. English- speaking and Spanish-speaking injured workers receive orders with appeal notices in their primary language and can readily understand them. Non-Spanish speaking LEP workers like Ms. Resulović have no way to know the importance of the language describing appeal rights, obligations, and deadlines or that it contains vital information on which they must act within a given time period.

Thus, in Ms. Resulović's case, the Department's failure to provide the appeal notice to her in the required "black face" type prejudiced her. Therefore, the Legislature's aim of assuring that her attention was called to this information was vitiated by the Department's failure to use "black faced" or bold face type. Thus, these orders were defective and the appeal notice therein was defective. Therefore, the orders were void because the orders never became effective under RCW 51.52.050. Thus, Ms. Resulović's appeals were timely because she had no obligation to appeal the orders upon receipt under RCW 51.52.060.

b. The Court May Not Rewrite RCW 51.52.050 to Eliminate or Alter the "Black Faced Type" Requirement.

To disregard the defective appeal notice provisions of these orders is tantamount to rewriting the statute to omit the "black face" type

requirement. Our courts, however, are not authorized to re-write statutes. On the contrary, "courts are required to give effect to every part of a statute, whenever possible, and should not deem a clause superfluous unless it is the result of an obvious drafting error." *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987). Giving effect to every part of RCW 51.52.050 leads to the inevitable conclusion that Ms. Resulović was not given proper notice of the time period in which she must appeal, as required by our Legislature. It follows that the 60-day appeal period never commenced and that Ms. Resulović's Board appeals were timely under RCW 51.52.060.

c. Orders to LEP Workers Entirely in English Do Not Satisfy the "Communication" Requirement of RCW 51.52.060(1).

i. Sending an order one cannot understand is not "communicating" it.

RCW 51.52.060(1)(a) states that a person aggrieved by an Department order *must* file an appeal "within sixty days from the day on which a copy of the order . . . was communicated to such person ...." First, it should be noted that the worker need not appeal within 60 days from any Department order which does not contain the appeal rights language in "black faced type" as explained above. Therefore, Ms. Resulović had no obligation to appeal the orders within 60 days of receipt, unless this Court holds the "black face" type language is surplusage.

The Legislature put the communication requirement in both RCW 51.52.050 and 51.52.060. The former Department to communicate the order to the worker. The later statute starts the worker's appeal time clock when the order is "communicated." Workers are not required to appeal orders which are not "communicated." *Haugen v. Department of Labor & Industries,* 183 Wash. 398, 401, 48 P.2d 565 (1935).

The Act does not define the term "communicate." Webster's Third New International Dictionary (1986) defines "communicate" as "to make known: inform a person of: convey the information or knowledge of." Note that this definition cannot, favoring the injured worker, be construed to be synonymous with "provide a copy of a written document in a language which the recipient cannot understand." Common sense and everyday experience tell us that when trying make something known to one who cannot understand English, one is unlikely to accomplish that goal by using the English language. Rather, to do so, one must use a language the recipient understands -- the recipient's primary language.

Notwithstanding the fact it knew Ms. Resulović was not proficient in English and was only proficient in Bosnian, the Department did not translate its orders – or any part of its orders – into Bosnian. As a result, the Department orders were not "communicated" to Ms. Resulović. The

60-day appeal period was, therefore, not triggered until she learned the contents of the orders immediately before she filed her appeals.

ii. Rodriguez dicta *is outdated and does not control here.*

In *Rodriguez v. Department of Labor & Industries*, 85 Wn.2d 949, 540 P.2d 1359 (1975), the Washington State Supreme Court addressed whether delivery of an English only order made the LEP worker's appeal filed over 60 days later untimely. In *Rodriguez,* the Court recited that the oft stated principle [true in cases where there is no language barrier] that delivery constituted "communication."[6] Rather than finding the appeal untimely, the Court applied equity and found the appeal timely. Here the Court should do the same because the Department came to the Board with unclean hands, sending orders in English only knowing that Ms. Resulović could not understand it.

To interpret "communicate" to mean "provide a copy [in English] of" violates not only the Court's obligation to interpret the Act in favor of the injured worker, but also two time-honored rules of statutory construction. The first rules, the no surplusage rule, has been addressed above and will not be repeated. The second rule is that "[w]hen the Legislature uses different words within the same statute, we recognize that

[6]This Court recently cited *Rodriguez* for this principle in *Shafer v. Department of Labor & Industries*, No. 58454-5, June 11, 2007, a case involving an English-fluent worker.

a different meaning is intended." *State v. Roggenkamp,* 153 Wn.2d 614; 625, 106 P.3d 196 (2005). This rule means the Legislature intended two separate things when using the phrases "send a copy" and "communicate" in RCW 51.52.050 – not the same thing as suggested by *Rodriguez.*

Applying the reasoning from *Rodriguez* to RCW 51.52.060 should not result in this court's misconstruction of RCW 51.52.050. It should also be remembered that in *Rodriguez,* the Supreme Court, finding as it did Rodriguez' appeal timely based on equity, did not address the other constitutional and statutory rationales addressed herein which require communicating the order in the LEP worker's primary language,.

2. Washington State Public Policy Requires Orders be Communicated to LEP Workers in Their Primary Language.

To determine public policy, the Courts look to expressions of public policy by the legislature. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). In RCW 2.43.010, our legislature expressed a clear public policy to ensure that LEP persons be adequately informed of their rights, stating:

> It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is grossly at odds with this public policy to notify LEP workers of their appeal rights with notices entirely in English as the Department did here. The appeal deadlines, having been stated in English only in those orders, should be deemed null and void as a matter of public policy.

3. Executive Order 13166 Requires All Notices and Orders to LEP Applicants be in Their Primary Language.

Further support for Ms. Resulović's position is provided by Executive Order 13166, signed by President Clinton on August 11, 2000. EO 13166 focuses specifically on access to federally assisted benefit programs for LEP persons. EO 13166 mandates that federally assisted benefit programs must take steps to "ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964...."

Washington's Department of Labor & Industries is a recipient of significant federal funds. Millions of federal dollars are deposited into the Medical Aid and Accident Funds each biennium. See **Appendix C**, showing the Department's federal funding for the years 1997-2007.

EO 13166 further states that these programs must comply with guidelines established by Department of Justice to assure full access by

LEP persons. The guidelines, the LEP Guidance, require these programs must provide LEP individuals language assistance. Section VI states:

> Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or "LEP," [and are] entitled to language assistance with respect to a particular type of service, benefit, or encounter.

DOJ's LEP Guidance Introduction mandates all recipients of federal assistance, like the Department, comply with EO 13166, stating:

> Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided. . . ***Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services.*** [Emphasis added.]

It is abundantly clear that the Department did nothing to reduce Ms. Resulović's language barrier and thus has violated EO 13166. By not translating the orders into Bosnian for Ms. Resulović, the Department made it impossible for her [without language assistance that it refused to provide] to understand the orders and her appeal rights. This prevented her from knowing that she could, how she could, and that she needed to appeal the orders to receive appropriate benefits under the Act.

Because the Department orders and their language on appeal rights are sharply at odds with EO 13166, both the Board and by the Superior Court erred in enforcing the deadlines set forth therein.

4. Sending Ms. Resulović Orders in English Only Violated Both Due Process and Equal Protection.

Ms. Resulović is also entitled to due process in Department claim handling. In *Buffelen Woodworking v. Cook*, 28 Wn.App. 501, 625 P.2d 703 (1981), the Court ruled, saying:

> We perceive a worker's interest in potential benefits as substantial because of the statutory abrogation of his common law right to sue his employer for work-related injuries in exchange for his exclusive remedy under the worker's compensation act. See RCW 51.04.010. We hold that an applicant for worker's compensation benefits whose claim is not finally adjudicated has a property interest of sufficient magnitude to trigger the application of procedural due process requirements.

In *Sherman v. Washington*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995), the Washington State Supreme Court, applying due process to administrative proceedings, observed: "The fundamental requirement of due process is notice and the opportunity to be heard." To be meaningful, notice must apprise a party of rights and provide the opportunity to know the opposing party's claims, the opportunity to meet them, and a reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

It is too obvious for argument that for notice to be meaningful, it must be provided in a manner that is comprehensible to the recipient. The United States Supreme Court has so indicated, holding that the "unique information about the intended recipient" determines whether a notice is

adequate or not. *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006). In *Jones,* the Court invalidated notice, saying at 1715 that:

> [W]hen notice is a person's due . . .[t]he means employed must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it.

The orders here, entirely in English, were not such notices, they were such ones used to actually prevent notice. They ignored Ms. Resulović's unique LEP status and need for Bosnian and apprised her of nothing.

Sending English only orders to LEP workers does not constitute notice because, as wisely noted by the Arizona Supreme Court in *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998), using English to communicate with non-English speakers "effectively bars communication itself."

Another aspect of due process is the right to understand one's rights before waiving them. See *State v. Teran*, 71 Wn.App. 668, 862 P.2d 137 (1993), where the Court recognized that where is a language barrier, a person may only waive rights knowingly and voluntarily after being advised of those rights "in his native tongue." The same principle applies here. Ms. Resulović, not being advised of her appeal rights in her native tongue, did not waive those rights by not appealing within 60 days.

What translation is sufficient to satisfy the notice requirements of due process? Obviously, translating the entire order including appeal rights language printed in "black faced" type into Bosnian in bold faced

type was required to give Ms. Resulović notice to allow her to understand and exercise her appeal rights after becoming aware of them.

Ms. Resulović's equal protection rights were also violated. The Department of Social and Health Services [DSHS] sends all notices and communications to its non-English speaking applicants in their own language. It has been done so for over 15 years pursuant to a consent decree to resolve a class action case. See *Reyes and Penado, v. DSHS*, US District Court Western District of Washington No. C91-303 (1991) [**Appendix E**] a case under Title VI against DSHS for its use of English only to communicate with applicants. Pursuant to that consent order, DSHS began providing free interpreters for all oral communications with LEP applicants. Further, DSHS agreed to provide all important written communications, including specifically all notices regarding entitlement to and changes in benefits to LEP persons in their own language.

DSHS implemented LEP policies for LEP applicants in WAC 388-271-0010 [providing free interpretation for all in person and phone communications with DSHS and free translation of DSHS forms, letters and printed material], WAC 388-271-0020 [DSHS provides "timely" interpreter services, pays for them, and may request them even if the applicant does not], and WAC 271-0030 [DSHS provides "timely" "fully translated" all written materials in the applicant's primary language

including, but not limited to, pamphlets and informational material, forms and applications, letters; DSHS pays for all these translations].

The Department of Employment Security [DES] likewise provides interpreters and translated notices in a similar fashion to LEP applicants. DES even maintains a compilation of federal laws, regulations and guidelines to ensure compliance, making it available for all at each office, providing "at least one person available to assist individuals seeking information on such programs" pursuant to WAC 192-12-173.

In contrast, with the exception of Spanish-speaking workers, LEP injured workers receive entirely different treatment by the Department. These appellants receive no notices or written materials in their primary language and receive interpreter services in the most narrow of circumstances. It is clear that injured LEP workers – other than those who speak Spanish -- are treated differently from those LEP applicants for benefits from at least two other State agencies. Stated differently, had Ms. Resulović applied for DSHS or DES benefits, she would have been provided language assistance in all phases of her agency contacts. She was denied them in entirety for Department written communications.

There is no rational basis for the distinction between, *exempli gratia,* LEP recipients of DSHS benefits and LEP recipients of DLI benefits. Nor is such a relationship to distinguish between Spanish-

speaking and non-Spanish speaking LEP workers. There must be both a rational relationship between the distinction between these classes of recipients and some permissible legislative purpose. When such a rational relationship is lacking, there is a violation of the right equal protection of the laws. See *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d 352, 804 P.2d 621 (1991).

5. Ms. Resulović's Appeals were Timely Based on Equity.

Our State Constitution gives equity power to the courts. The adoption of the Act did not alter this power. *Fields Corp. v. Department of Labor & Industries,* 112 Wn.App. 450, 456, 45 P.3d 1121 (2002).

As part of its healthy respect for the Industrial Insurance System, the Court has a long-standing policy of assuring fundamental fairness to the individual injured worker. In *Somsak v. Criton Technologies*, 113 Wn.App. 84, 52 P.3d 43 (2002), Court said:

> "Fundamental fairness" requires that a claimant must be **clearly advised** of the issue before it will be barred by the doctrine of res judicata. *King v. Dep't of Labor & Indus.*, 12 Wn. App. 1, 4, 528 P.2d 271 (1974). [Emphasis added]

When an injured worker is not "clearly advised" of the contents of a Department order, the Court intervenes to ensure the worker's rights are not violated and the right of appeal is protected by finding:

1) The Department's order did not meet the requirements of RCW 51.52.050 and therefore no appeal was required within 60 days by RCW 51.52.060; or

2) DLI's order was not "communicated" to the worker under RCW 51.52.050 or RCW 51.52.060; or

3) Equity requires finding an appeal timely despite apparently being filed late.

Even where it finds 1) all requirements of RCW 51.52.050 were met, and 2) the order was received more than 60 days before the Board appeal was filed, the Court must determine whether equity requires finding Ms. Resulović's appeals timely.

Inconsistent results in similar cases before this Court without real distinctions suggest finding Ms. Resulović's appeals timely is proper.[7] All involve recent LEP immigrants fluent in Bosnian who received orders in English only. All appealed directly after learning of the right to do so.

Significant Board Decisions intended to provide guidance are inconsistent with the ruling in this case. In Board Significant Decision, *In re Cecelia Envilla.* No. 93 1856 (1994), an LEP worker appeal filed within 41 days of learning the order's contents from a doctor was held timely.

[7] The Board found appeals by Ivan Ferenćak [COA No. 58878-8-I months "late"] timely while finding similar appeals filed by Gordana Lukić and Maida Memišević [consolidated in COA No. 57445-1-I], and Ferid Mašić [less than two weeks "late", no COA No. yet assigned at present] untimely. In Mr. Ferenćak's case, the Department stipulated the appeals were timely because he appealed "within 60 days of being informed of the contents of the order by an interpreter." In this case, Ms. Resulović's appeals filed well within the same time frame were found untimely. All these cases are at this Court on interpreter issues currently.

Despite appealing *immediately* after learning the same from her physician, Ms. Resulović's appeals were found untimely. This inconsistency does not promote "sure and certain relief" guaranteed by the Act. Instead, it cries out for a rule on "communication" which treats LEP workers fairly and equitably *vis-à-vis* English speaking workers.

Since the 1930s, our courts have applied equity to find Board appeals timely which fell outside the appeal period. See *Ames v. Department of Labor & Industries,* 176 Wash. 509, 513, 30 P.2d 239 (1934), where the Court avoided the appeal limit for an adjudicated incompetent on equitable grounds, saying at 513:

> The general policy of our laws is *to protect those who are unable to protect themselves,* and equitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules. Our Legislature has always been well advised of the uses and the purposes of equity, and it would be abhorrent and contrary to established public policy to hold that the legislature intended by the limitations in the industrial insurance act to permit the department to deal *ex parte* with a workmans claim and deny his just rights unheard while he was known to be *non compos mentis.* [Italics added by Supreme Court in *Kingery* at 123-5.]

In 1975 in *Rodriguez, supra*, the Supreme Court applied equity to find an appeal timely because the worker who could not communicate in English, had not available interpreter, and received an English only order. Since *Rodriguez*, the Department has adopted the policy of sending

Spanish-speaking workers all informational pamphlets, letters, orders and notices in the Spanish language to eliminate this barrier to benefits.

The essence of the Department error in both *Ames* and *Rodriguez* was in sending orders to workers knowing they would be unable to understand them. The Supreme Court reviewed these cases in *Kingery v. Department*, 132 Wn.2d 162, 174. 937 P.2d 565 (1997), saying:

> We avoided the statutory time limits because the claimant was insane and without a guardian during the appeal period, and the Department acted *ex parte*, knowing of Ames' incapacity. Similarly, in *Rodriguez v. Department of Labor & Indus.*, 85 Wash. 2d 949, 540 P.2d 1359 (1975), we held Rodriguez's untimely appeal would be allowed because he was unable to read or write Spanish or English and spoke Spanish only; moreover, the Department knew or should have known of such illiteracy through medical reports. Rodriguez's interpreter was unavailable when the order was issued.

In *Fields Corp.,* the Court analyzed the three *Kingery* opinions at 459:

> [F]ive or more justices subscribed to three propositions. First, equitable relief from res judicata is *not* limited to circumstances in which the claimant was incompetent or illiterate; CR 60 and/or "the court's equitable powers: permit the court to grant relief under other circumstances also. Second, as one condition of equitable relief, the claimant must have diligently pursued his or her rights. Third Kingery [not LEP] had not diligently pursued her rights.

In *Rabey v. Department*, 101 Wn.App. 390, 3 P.3d 217 (2000), the Court identified another factor for the exercise of equity – the claimant's emotional condition. In *Rabey*, the Court found a Board appeal filed 14

months after her husband's death timely, [8] because the widow was "shocked and disoriented by [her husband's] death." The Court held she had "a form of diminished capacity roughly similar to that found in *Ames*." With proof of this emotional condition, the Court required no proof of diligence. Similarly in *Rabey*, the Court did not require the Department to have been aware of the widow's condition for equity to apply.

Thus, in general, the Court should consider the following equitable considerations to find an apparently late appeal timely:

1. The injured worker cannot understand the order because of inability to communicate in English or unsound mind.

2. The injured worker has a psychiatric/emotional condition impairing the ability to comprehend or act.

3. The Department is aware of the injured worker's incapacity or inability to understand English.[9]

4. The Department sends an order containing finality language knowing the worker cannot understand it.

Other cases apply also consider the Department's misbehavior in applying equity.[10] Because Ms. Resulović lacked English fluency and because the Department knew she could not understand its order without an interpreter, this Court must examine these factors to determine whether it should exercise equity in her favor to find her appeal timely.

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[8] RCW 51.28.050 requires survivor applications be filed within 1 year of worker death.
[9] However, the Department's knowledge of psychological problems is not required for equity to apply. *Rabey, supra.*

The Department's use of English only orders here constituted action with unclean hands, justifying finding the appeals timely.

D. THE SUPERIOR COURT ERRED BY APPROVING THE DEPARTMENT'S USE OF ENGLISH ONLY AND THE BOARD'S INTERPRETER ACTIONS.

1. The Department's Orders Represented A Decision to Use a Language It Knew Ms. Resulović Could Not Understand.

The 2002 and 2004 Department orders Ms. Resulović appealed were in English only, despite being issued after the Department claim manager learned of her LEP status and need for interpreter services in 2000. The Department thus denied her right to communication in a language which she could understand. Ms. Resulović raised this issue in and requested reimbursement for interpreter services needed due to her industrial injury in both her notices of appeal to the Board.

Even after these appeals, the Department has continued to send Ms. Resulović English only orders.[11] This shows that the Department will continue to issue orders in a language calculated not to communicate with her until forced to do otherwise by the Courts.

For the reasons set forth above and below, the Superior Court's approval of this practice was error requiring reversal.

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[10] *Kingery, supra,*

[11] Ms. Resulović's physician requested the Department reopen her claim to treat her industrially related psychiatric condition. The Department refused. Ms. Resulović appealed. The Department took the matter under reconsideration in 2005 and has still not

2. Ms. Resulović Was Entitled to Free Interpreter Services at the Department and at the Board.

a. Department Policies Improperly Refuse Interpreter Services.

Department Interpreter policies in effect during Ms. Resulović's claim [PB 99-09, PB 03-01, PB 05-04, **Appendix D**] specifically authorize interpreter services for medical care. Despite this, Ms. Resulović did not receive interpreter services for all her medical care.

These Department interpreter policies consistently refuse interpreter services for certain communications essential for LEP injured workers seeking benefits under the Act, including:

Translating Department documents/forms at worker request;
Scheduling medical appointments and testing;
Translating correspondence to and from the Department;
Interpreting for worker communication with counsel; and
Interpreting worker phone calls to Department personnel.

Essentially, this shifts the expense for interpreter services to non-Spanish speaking LEP workers and while denying them access to written information provided at no expense in their own language to English- and Spanish-speaking workers. These policies are unsupportable.

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accepted or rejected the application to reopen, leaving Ms. Resulović without the treatment sought in her 2005 notice of appeal of the closing order.

b. Board Regulation Fails to Ensure Necessary Interpreter Services.

The Board interpreter regulation, WAC 263-12-097 [**Appendix F**], allows, but does not require, free interpreter services for LEP workers "throughout *the* proceeding." Thus, WAC 263-12-097 fails to ensure that LEP workers receive free interpreters needed for their appeals. The Board's implementation in this case specifically refused interpreter services for discovery occurring during the proceeding of Ms. Resulović's appeals, demonstrating the inadequacy of WAC 263-12-097.

3. Denying Interpreter Services Violates the Industrial Insurance Act.

As noted above, RCW 51.52.050 requires the Department to "communicate" orders to workers in certain form. The Department orders/notices sent to Ms. Resulović failed to comply with these requirements and denied her important information while shifting interpreter cost to her which the Department should have borne. This violates the mandate of RCW 51.12.010 that the Act be interpreted to minimize Ms. Resulović's "economic loss due to industrial injury" by increasing that loss and the Act's aim to provide "sure and certain relief" under **RCW 51.04.010** by delaying the relief necessitating an expensive and time consuming appeal. Likewise, the Board's denial of interpreter services in discovery increased Ms. Resulović's economic loss and delayed her "sure and certain relief."

4. Denying Interpreter Services Violates Public Policy.

As noted above, the Legislature has expressed the firmly held public policy to assure necessary interpreter services for LEP persons dealing with state agencies. Both the Department's and the Board's denial of interpreter services to allow Ms. Resulović to respond in discovery violated the public policy that she be provided with interpreter services throughout agency proceedings.

5. Denying Interpreter Services Violates WLAD.

Washington's Law Against Discrimination, RCW 49.60, was adopted "for the protection of the public welfare, health, and peace of the people of this state . . . in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010 states Washington public policy saying:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . national origin. . . threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

WLAD bans discrimination based on national origin in public places and accommodations, defined broadly by RCW 49.60.040 to include:

> Any place of public resort, accommodation, assemblage or where the public gathers, congregates, . . . or for the benefit, use, or accommodation of those seeking health,. . . or where medical service or care is made available, or where the public gathers, congregates, or assembles for . . . public purposes, or public halls

There can be no doubt that 1) obtaining and ruling on benefits under the Industrial Insurance Act, whether medical or financial, are public purposes and 2) discrimination based on national origin by both Department and Board is banned at any place where such requests for services are received or ruled upon by these agencies. This requires all such locations to provide LEP injured workers interpreter services so that their rights are treated equally with other injured workers. Likewise, it is beyond dispute that Department and Board facilities are public facilities subject to WLAD, just as Washington Courts are. See *Duvall v. County of Kitsap*, 260 F.2d. 1124, 1139 (9th Cir. 2001).

6. Denying Interpreter Services Violates RCW 2.43.

a. RCW 2.43 Is the Ultimate Authority on Providing Interpreters.

Chapter RCW 2.43 applies to both Department and Board proceedings when LEP injured worker claims or appeals are involved. The Department issues orders which determine injured worker benefits, while the Board determines appeals of those orders. At Superior Court, the Department asserted and the Superior Court erroneously agreed that RCW 2.43 does not apply. This simply cannot be. To allow an injured worker's claim and appeal to be administered by state agencies which claim an exemption from RCW 2.43 [stated nowhere in RCW 2.43] violates RCW 2.43.010, *et seq.*

Both Board and Department spend public funds for interpreters. Both recognize Chapter RCW 2.43 the source of their authority to do so. The Board recognizes this in WAC 263-12-097, stating:

> . . . [I]nterpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW.

The Department's Interpreter Policy recognizes this, listing "RCW 2.43.010, the Right to Interpreter Services in Legal Proceedings" as containing "relevant information for interpretive services providers."[12] There is simply no other legislative authorization found in Washington statute for purchasing interpreter services to provide to LEP workers. For agencies which claim they derive their right to spend funds for interpreters from RCW 2.43 to deny that they are bound by RCW 2.43 is absurd.

b. Denying Interpreter Services Violates Chapter RCW 2.43.

RCW 2.43.010 requires agencies to provide interpreters to LEP persons *throughout proceedings.* RCW 2.43.030 requires the agencies to pay for this expense and includes interpreter services as costs where available, *i.e.* here under RCW 51.52.030. Because both the Department and Board violated RCW 2.43 by failing both to provide and pay for all necessary interpreter services, the Superior Court erred in not awarding

[12] PB 05-04, p. 16, **Appendix D.**

Ms. Resulović reimbursement of interpreter costs under RCW 2.43.040 and in approving the Board's and Department's practices.

7. Denying Interpreter Services Violates Executive Order 13166.

Washington's Industrial Insurance program is administered by the Department which receives millions of federal dollars every biennium into both its Medical Aid and Accident Funds.[13] See **Appendix C.** As noted above, Executive Order 13166[14] requires federally assisted programs to communicate with LEP benefit applicants in their primary language. Section VI of the DOJ Guidance states that LEP persons are entitled to language assistance not only for "services" and "benefits" but also for "encounters" with federally assisted programs. Both the Board and the Department were required to ensure Ms. Resulović as an LEP person "meaningful access to" Industrial Insurance benefits and failed to do so. Both, thus, violated their obligations under EO 13166 as discussed above. The Superior Court's conclusion otherwise is error.

8. Denying Interpreter Services Violates Title VI.

Title VI of the Civil Rights Act of 1964, 42 USC 2000d, *et seq.*, prohibits discrimination based on national origin. The Department of Justice in a 2000 Introduction describing Federal Protections Against National Origin Discrimination states unequivocally:

> Federal laws prohibit discrimination based on a person's national origin, race, color, religion, disability, sex, and familial status. Laws prohibiting national origin discrimination make it illegal to discriminate because of a person's . . . language.
>
> Current Department Interpreter Policy PB 05-04 [**Appendix D**]

recognizes that the failure to provide adequate interpreter services for medical care constitutes discrimination based on national origin and violates Title VI. By the same reasoning, the Department's failure to provide for interpretation for other necessary communications on her Industrial Insurance claim – *e.g.* communications with the Department, with the Board, to respond in discovery or with her attorney similarly constituted banned discrimination against Ms. Resulović based only on her national origin violating Title VI.

As noted above, DSHS and DES provide interpreters to all LEP applicants for all notices/contacts and adopted regulations so requiring. The Board, as a state agency, issued no notices or decisions in Ms. Resulović's language and failed to provide interpreter services to explain those rulings to her or allowing her attorney to explain them to her. The Board even refused interpreter services for the discovery contact between the Department and Ms. Resulović on appeal. It is shocking that at the

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[13] The funds from which both worker benefits and Board expenses are paid.
[14] Entitled "Improving Access to Services for Persons with Limited English Proficiency"

Board appellate level, Ms. Resulović received less interpreter services than she was entitled to as an initial applicant for DSHS and DES benefits. Until the courts remedy this situation, the Board will continue to violate Title VI so that LEP persons injured while working must pay for much of the interpreter services required on their Board appeals while those who are not working receive these services in all phases of appeals.

9. Denying Interpreter Services Violates Due Process.

Both Washington State and United States Constitutions guarantee due process. Wash. Const. Article I § 3; US Const. Amend. XIV. As noted above due process ensures a person receive both meaningful notice and the opportunity to be heard. *Sherman, supra; Cuddy, supra*

Since 1952, the Washington Supreme Court has recognized that worker Board appeals are governed by due process. *Karlen v. Department of Labor & Industries,* 41 Wn.2d 301, 304, 249 P.2d 364 (1952). The Supreme Court reaffirmed this in *Willoughby, infra,* 733.

It is equally obvious that a LEP worker cannot "place his claim" before the Board without being able to communicate with her attorney. If the worker and her attorney cannot understand each other, it is hard to imagine how the worker's claims can be presented to the tribunal in an effective manner. In this case, Ms. Resulović's request for an interpreter to respond in discovery was not accommodated, costing her $180.

It is also true that an injured worker cannot place her claim before a tribunal without first being apprised of the exact nature and extent of her injury, which in turn requires effective communication with a physician. The Department inconsistently provided interpreter services for this communication, despite the fact that Department interpreter policies require them for medical care. The current policy, PB 05-04, recognizes that failure to provide interpreter services violates title VI. *Vide infra.*

Another consequence of English only use by both the Department and the Board is to shift costs to LEP injured workers which other injured workers do not incur. This severely limits LEP workers' ability to present evidence to prove entitlement to benefits – infringing on their opportunity to be heard in a meaningful way and adversely impacting their ability to meet the Department's claims at the Board.

This Court should reject any attempt by the Department or the Board to assert due process considerations do not apply or apply differently here because "English is our national language" or because LEP injured workers are undeserving of the same benefits as other injured workers until they learn English. Such "nativist" arguments are to be recognized for the unlawful prejudice they reflect. See Califa, *Declaring English the Official Language: Prejudice Spoken Here,* 24 Harv. C.R.-C.L. Law Review 293 (1989).

The Washington Supreme Court has applied due process concepts to invalidate a Department policies which limit payment of benefits to certain incarcerated injured workers, but not others, in *Willoughby v. DLI*, 147 Wn.2d 725, 57 P.2d 611 (2002). There, the Court applied substantive due process analysis in rejecting a Department policy, as violative of due process. The Court rejected the Department's assertion that the policy was justified because it saved the state money, because:

> The Act's purpose was to shift the cost of injury to industry and
>
> Saving the state money did not justify withholding benefits.

Similarly, the Court should reject any arguments that policies shifting interpreter costs to LEP workers are justified to save the state money.

By failing to provide (or reimburse) translator services for all aspects of the proceedings – including to respond to the Department's discovery requests -- the Board denied Ms. Resulović due process.

10. Denying Interpreter Services Violates Equal Protection.

Equal protection, our American view that the law should treat those situated similarly equally, applies under both the federal and state constitutions. US Const. Amend. XIV; WA Const. Article I §3. Equal protection applies to Industrial Insurance benefits and the administration of the Act by both Department and Board. *Macias v. DLI*, 100 Wn.2d 263, 668 P.2d 1278 (1983); *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d

352, 804 P.2d 621 (1991). Under *Macias,* the Supreme Court held that equal protection extends to undocumented immigrant workers. Certainly documented immigrant workers like Ms. Resulović should also receive equal protection in the handling of her claim and appeals.

Where differential treatment is based on a constitutional right or a suspect class, the strict scrutiny test applies. *Macias*, at 267-268. Such distinctions survive constitutional challenge *only* if a compelling interest supports them. In *Andersen v. King County*, 158 Wn.2d 1, 138 P. 963 (2006), the Court explained why national origin is a suspect class, saying::

> Race, alienage, and national origin are examples of suspect classifications. Suspect classifications require heightened scrutiny because the defining characteristic of the class is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.

Ms. Resulović has constitutional rights to travel, as did the worker in *Macias, and* to use a language other than English. *Meyer v. Nebraska*, 43 S.Ct. 625, 262 U.S. 390 (1923). There being no compelling interest mandating the Department's and the Board's policies on interpreter services, they violate equal protection, especially when the Department communicates in Spanish and English but not in other languages.

If Ms. Resulović were not protected by the strict scrutiny test, the rational relationship test would apply. Under this test, there must be a

rational relationship between the classes distinguished and a permissible legislative purpose. Where no rational relationship exists to distinguish between the classes, there is a violation of the equal protection of the laws. *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d 352, 804 P.2d 621 (1991).

Ms. Resulović submits that distinguishing between Spanish-fluent LEP workers and other LEP workers is not rational, even if the Department argues it does so to save the state money. In *Willoughby*, the Court ruled that saving money at worker expense is not a permissible legislative purpose under the Act. Likewise, the Court in *Cockle,* 142 Wn. 2d 801, 16 P. 3d 583 (2001) and *Willoughby, supra*, rejected cost savings to justify excluding benefits from wages or refusing to pay benefits.

It is very easy to see that there is neither any rational basis to distinguish between LEP recipients of DSHS and DES benefits and LEP recipients of DLI benefits nor any legitimate legislative purpose under the Act to do so. The same is true for the Department's practice of distinguishing between English-speaking and Spanish-speaking injured workers and other LEP injured workers. Therefore the Superior Court erred in not finding that the Board and Department actions violated Ms. Resulović's equal protection under both the strict scrutiny and the rational relationship tests.

11. Refusing Interpreter Services Violates the Right to Counsel.

Injured workers are entitled to retained legal representation on claims both at Department and at Board levels. WAC 263-12-020. The right to retained counsel includes the right to confer with counsel to prepare for and during hearings. By denying Ms. Resulović interpreter services at either the Board's or the Department's expense to respond in discovery, the Department and Board policy prevented her from fully exercising her right to representation by retained counsel as well as imposing the Department's rightful interpreter costs upon her.

The Board receives and evaluates testimony on issues before it. It goes without dispute that all injured workers are entitled to attend and participate in all proceedings where testimony is received on their appeals. The right to representation by counsel at the Board includes the right to confer with counsel during Board hearings to provide for adequate participation in and understanding of the proceedings.

E. Ms. Resulović is Entitled to Reimbursement of Interpreter Expenses Incurred on Her Industrial Insurance Claim.

1. Shifting Interpreter Costs Impermissibly Diminishes Benefits of LEP Workers.

Our Supreme Court characterized the first Industrial Insurance Act "this noble legislation" in *Stertz v. Ind'l Ins. Comm'n*, 91 Wash. 588, 158 P. 256 (1916). Our Supreme Court has also held that when a statute sets a

minimum benefit, expenses incurred to obtain benefits may not be shifted to the insured because this reduces the guaranteed minimum benefit. *Kenworthy v. Penn. Gen. Ins.*, 113 Wn.2d 309, 779 P.2d 257 (1989).

It goes without dispute that Title 51 RCW establishes a statutory insurance benefit schedule for disabled injured workers. As a disabled worker with a spouse and one dependent child, Ms. Resulović was entitled to an Industrial Insurance time loss benefit of 67% of her "wages." RCW 51.32.060 & 51.32.090.

The Department's and the Board's policies of shifting interpreter expenses to Ms. Resulović significantly reduced her benefits below the benefit guaranteed by the Industrial Insurance Act. This cost shifting policy impermissibly "whittled away" at the Resulović family's benefits based solely on their LEP status and national origin. These Department and Board policies violate the Act's objective to reduce the Resulović "economic loss" due to industrial injury "to a minimum." The only way to rectify this diminution of Ms. Resulović's Industrial Insurance benefits is to reimburse her for the interpreter expenses she incurred because of her industrial injury and to award interest on that reimbursement.

Ms. Resulović was prejudiced by being forced to respond to questions about documents presented to her only in English which the IAJ would not allow the interpreter to interpret before she was required to

respond to Department questioning about whether she could recognize documents in a language which she could not read. See 9/7 TR 40-45.

F. ATTORNEY'S FEES SHOULD BE AWARDED TO MS. RESULOVIĆ IF SHE PREVAILS ON ANY ISSUE.

RCW 51.52.130 provides that an injured worker who prevails at Superior Court and higher appeals is entitled to attorney fees and costs, including the costs incurred for witnesses at the Board.

In *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999), the Supreme Court expressed the "unitary claim" theory that an injured worker who prevails *on any issue* is entitled to attorneys fees on all issues both at the Superior Court and at the appellate court level. The court in *Brand* stated at 668:

> The Legislature amended RCW 51.52.130 to strengthen the purpose of providing representation for injured workers by allowing attorney fees awards at the appellate court as well as the superior court...

The Court further stated at 670:

> By the plain language of RCW 51.52.130, a worker who obtains reversal or modification of the Board's decision and additional relief on appeal is entitled to an award of attorney fees. Consistent with the plain language of RCW 52.52.130, its underlying purpose, and the entire Industrial Insurance Act's statutory scheme, attorney fees awards under RCW 51.52.130 should not be reduced in light of the total benefits obtained by the worker ***nor should the attorney fees be limited to fees generated from the worker's successful claims.*** [Italics and emphasis added]

Based on *Brand, supra,* there is no doubt that if this Court rules in Ms. Resulović's favor on any issue, she is entitled to an award of attorney's fees for work on all issues at both the Superior Court and this court, including her interpreter expenses under RCW 2.43.040.

G. THE SUPERIOR COURT ERRED IN AWARDING ATTORNEY FEES TO THE DEPARTMENT AGAINST MS. RESULOVIĆ.

1. Propriety of Attorney Fee Awards Against Workers Is Undecided.

In *Black v. DLI*, 131 Wn.2d 547, 933 P.2d 1025 (1997) over a worker challenge, the Supreme Court approved an attorney fee award to the Department under RCW 4.84.030. When it did so, the Supreme Court noted at 557 that the worker offered "no coherent argument why the award was improper." Because the *Black* decision had no coherent argument to address, the following reasoned argument is offered showing why the Superior Court's award of attorney fees to the Department was error.

2. Awarding Attorney Fees and Interest Against Ms. Resulović Violates the Act's Specific Statute on Attorney Fees.

In RCW 51.52.130, the Industrial Insurance Act contains a comprehensive provision on attorney fees in appeals of Board decisions, specifically limiting when and to whom attorney fees may be awarded at Superior Court and appellate courts. This statute provides only for an

award of fees against the Department – not against workers.[15] RCW 51.52.130 **never** provides for any attorney fee award against the injured worker. Indeed, the Supreme Court in *Brand, supra,* at 667 held the purpose of RCW 51.52.130 is to ensure injured workers get adequate legal representation without diminishing their benefits.

RCW 51.52.140 specifically states that "the practice in civil cases" applies to appeals of Board decisions "[e]xcept as otherwise provided" in the Act. RCW 51.52.130 provides otherwise and is contained in the Act. Therefore, it prevails over Chapter RCW 4.84 and Chapter RCW 4.56.

The right to statutory attorney fees is a substantive right. *Pennsylvania Life v. Employment Security*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). Thus, freedom from awards of attorneys and interest thereon against workers contained in RCW 51.52.130 and recognized in RCW 51.52.140 is unaffected by Chapter RCW 4.84 and Chapter RCW 4.56.

3. Awarding Attorney Fees and Interest Against Ms. Resulović Violates the Act's Policy.

RCW 51.52.130 implements the Act's policy stated in RCW 51.12.010 that the Act "**shall be liberally construed**" to reduce "**to a minimum the . . economic loss . . from injuries . . in . . employment**" and the mandate in RCW 51.04.010 for "**sure and certain relief for**

[15] It also provides for a fee award to workers who prevail on appeal and to employers under limited circumstances against the Department but never against a worker.

workers . . to the exclusion of every other remedy." Quite simply, the Superior Court erroneously awarded remedies and substantive rights to the Department not provided in the Act and which the Act specifically excluded as "other remedies." The Act thus protected Ms. Resulović against attorney fees award in RCW 51.52.130 and RCW 51.04.010. No attorney fee being available to the Department, it follows that no interest is available thereon under RCW 4.56.110.

4. Awarding Attorney Fees and Interest Against Ms. Resulović Violates Principles of Statutory Interpretation.

Citing the lack of "coherent argument" before it, the *Black* court interpreted RCW 51.52.140, construed the term "practice in civil cases" to include the Revised Code of Washington, RCW 4.84.080 [statutory attorney fees] and RCW 4.84.030 [prevailing party costs]. The *Black* Court did not address interest under RCW 4.56 [interest on judgments]. Principles of statutory interpretation mandate a different result. As noted above, the Courts must interpret all ambiguities in the Act in favor of the injured worker.[16] Under this principle, the proper interpretation is that RCW 51.52.140 mandates the application of the RCW 51.52.130 -- not the application of Chapter RCW 4.84. Even the Code Reviser's note to RCW

[16]*Cockle, supra*; 811, *Mackay v. DLI,* 181 Wn. 702, 44 P.2d 793 (1935).

4.84.010 specifically refers to RCW 51.52.130 concerning attorney fees and costs for appeals from Board decisions.

The Court said in *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004): "When more than one statute applies, the specific statute will supersede the general statute." This principle of competing statutes mandates that 1) RCW 51.52.130 prevails over RCW 4.84 and RCW 4.56 and 2) neither attorney fees nor interests may be awarded the Department.

In the *Brand, supra,* 670, the Supreme Court applied the principle *exclusio unius est inclusio alterius,*[17] saying:

> Where the Legislature has expressly limited fees available at one phase of the proceedings, it is unlikely that the Legislature intended to limit fees awards at the other phases without expressly enumerating those limitations.

In RCW 51.52.130, the Legislature expressly limited awards of attorney fees and costs at Superior and higher courts in RCW 51.52.130, expressly providing such awards to workers while never providing any against them or to the Department. Thus, under *exclusio unius,* the Legislature intended to and did exclude any such awards for the Department against the worker.

2. Awarding Attorney Fees and Interest Against Ms Resulović Violates the "Great Compromise."

The Industrial Insurance Act is a result of the "great compromise" in which workers traded civil remedies for guaranteed benefits -- "sure

and certain relief" under the Act. *Stertz, supra; Dennis v. DLI*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). This bargain guaranteed injured workers protection by the Act against assessment of both costs and attorney fees on unsuccessful appeals to Superior Court under RCW 51.52.130. The wording of RCW 4.84.010 that "[t]he measure and mode of compensation of attorneys . . . shall be left to the agreement . . . of the parties" requires this Court to respect and enforce the compromise struck nearly one hundred years ago which provides the basis for the Industrial Insurance Act. The Superior Court award of attorney fees and interest not included in RCW 51.52.130 violates the "great compromise" and is error.

V. CONCLUSION

Appellant respectfully requests this Court to issue an opinion

1) Finding that the Department Order closing her claim was not effective as violative of RCW 51.52.050;

2) Finding that Ms. Resulović's claim remains open for benefits;

3) Finding Ms. Resulović's notice of appeals were timely;

4) Reversing the Superior Court's judgment affirming the Board and awarding the Department attorney fees and interest;

5) Remanding for entry of appropriate judgment, findings of fact and conclusions of law which:

   a. Find both Department orders violated RCW 51.52.050;

[17] The expression of one is the exclusion of the other.

b. Order payment of all necessary and proper medical expenses and associated interpreter costs to the present,

c. Describe the nature and extent of interpreter services which the Board shall provide in future proceedings,

d. Require the Department to provide Ms. Resulović free translator/interpreter services for all written and oral communications regarding her claim, including future medical care, and for all Board appeals on her claim,

e. Awarding Ms. Resulović attorney fees, costs, and interpreter expenses under 51.52.130, RCW 2.43.040, and *Brand,*

f. Remanding to the Board for a hearing on calculation of Ms. Resulović's wages; and

6) Awarding Ms. Resulović attorney fees, costs, and interpreter expenses at the Court of Appeals under RCW 51.52.130, RCW 2.43.040, and *Brand.*

Respectfully submitted this 18th of June 2007.

Ann Pearl Owen, #9033,
Attorney for Emira Resulović, Appellant

APPENDIX A

EMPL: BIRTHDAY EXPRESS INC
11220 120TH AVE NE
KIRKLAND WA 98033

PROV: SCHIFF STAN R MD
STE 380
10330 MERIDIAN AVE N
SEATTLE WA 98133-9463

CLMT: EMIRA RESULOVIC
3434 S 144TH ST APT 210
SEATTLE WA 98168-4062

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

Claim Number : X304647
Work Position ID: UN10
Mailing Date : 02/20/04
Injury Date : [redacted]
Service Location: SEATTLE
UBI # : 601-553-086
Account ID : 871,733-00
Risk Class : 6407

PAYMENT ORDER

THE CLAIMANT'S PERMANENT PARTIAL DISABILITY AWARD IS FOR:

CATEGORY 5 PERMANENT DORSO-LUMBAR AND/OR LUMBOSACRAL IMPAIRMENTS.

THE CLAIMANT'S TOTAL AWARD FOR PERMANENT PARTIAL DISABILITY IS
$ 34316.49

TOTAL BENEFITS IN THE AMOUNT OF	$ 34316.49
LESS DEDUCTIONS:	
BALANCE OF UNPAID PPD	$ 26100.99-
NET ENTITLEMENT	$ 8215.50

THIS CLAIM IS CLOSED.

THE WORKER'S INITIAL CASH AWARD IS: $ 8215.50
THE BALANCE OF PERMANENT PARTIAL DISABILITY OF $ 26100.99 TO BE PAID AT THE RATE OF $ 829.59 PER MONTH, PLUS 8% INTEREST PER ANNUM ON THE UNPAID BALANCE. SEE ACCOMPANYING SCHEDULE OF PAYMENTS.

BOARD OF INDUSTRIAL INSURANCE APPEALS OLYMPIA, WASHINGTON
RECEIVED
JAN 19 2005

Name : JANET GRIGSBY
Title: CLAIMS MANAGER
Phone: 360-902-4533

YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER:
THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA, WA. 98504-2401.

APPENDIX B

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
PO BOX 44291
OLYMPIA, WA 98504-4291

MAILING DATE	04/02/2001
CLAIM NUMBER	X304647
INJURY DATE	11/23/1999
CLAIMANT	RESULOVIC EMIRA
EMPLOYER	BIRTHDAY EXPRES
UBI NUMBER	601 553 086
ACCOUNT ID	871, 733-00
RISK CLASS	6407
SERVICE LOC	Seattle

EMIRA RESULOVIC
3434 S 144TH ST APT 324
SEATTLE WA 98168-4063

NOTICE OF DECISION

The worker's time-loss compensation rate is $778.67 per month. The worker's total compensation rate includes all cost-of-living increases the department has allowed since the date of injury.

The worker's total time-loss compensation rates (above) were calculated by taking into account the following:

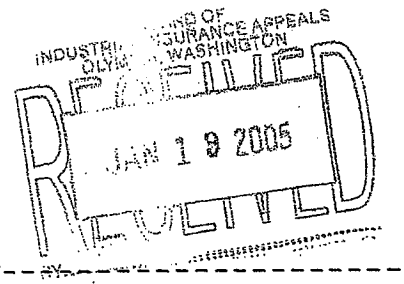
Earnings based on: $8.25 per hour, 10 hours per day, 3 days per week.

Worker's total gross wages: at the time of injury were set at $1072.50 per month.

Worker's employment pattern: regularly employed.

Worker's Martial Status: married with 1 dependents.

Supervisor of Industrial Insurance
By Linda J. Canton
Claims Manager
(360) 902-4346



|| YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401. ||

APPENDIX C

Federal Funds Received by Department of Labor & Industries & by Washington's Industrial Insurance Program

1997-2007

Biennium	Total Federal Funds In DLI Budget	Federal Funds in Accident Account	Federal Funds in Medical Aid Account	ESSB Reference
1997-1999	$16,706,000	$9,112,000	$1,592,000	6062 § 218
1999-2001	$16,654,000	$9,112,000	$1,592,000	5180 § 217
2001-2003	$20,956,000	$11,568,000	$2,438,000	6153 § 217
2003-2005	$24,818,000	$13,396,000	$2,960,000	5404 § 217
2005-2007	$26,806,000	$13,621,000	$3,185,000	6090 §217
Total	$105,940,000	$56,809,000	$11,767,000	

APPENDIX D

Department of LABOR AND INDUSTRIES

Published by
Health Services Analysis Section
Olympia, WA 98504-4322

PROVIDER BULLETIN

PB 05-04

THIS ISSUE

Interpretive Services Payment Policy
Effective July 1, 2005

TO:
Ambulatory Surgery Centers, Audiologists, Chiropractic Physicians, Clinics, Dentists, Drug and Alcohol Treatment Centers, Freestanding Emergency Rooms, Freestanding Surgery Centers, Hospitals, Interpretive Services Providers, IME Exam Groups, Massage Therapists, Naturopathic Physicians, Nurses-ARNP, Occupational Therapists, Opticians, Optometrists, Osteopathic Physicians, Pain Clinics, Panel Exam Groups, Pharmacists, Physicians, Physician Assistants, Physical Therapists, Podiatric Physicians, Prosthetists and Orthotists, Psychologists, Radiologists, Self-Insured Employers, Speech Therapists & Pathologists, Vocational Counselors

CONTACT: Provider Hotline
1-800-848-0811
From Olympia 902-6500

Loris Gies: PO Box 4322
Olympia, WA 98504-4322
(360) 902-5161
After July 1, 2005:
Karen Jost PO Box 4322
Olympia, WA 98504-4322
360-902-6803
Fax (360) 902-4249

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Purpose

This Provider Bulletin updates coverage and payment policies for interpretive services as required in WACs 296-20-02700 and 296-23-165. **This bulletin replaces Provider Bulletin's 03-01, 03-10 and 05-01.** The purpose of this bulletin is to notify providers and insurers of the following changes:

- Revised coverage and payment policy.
- Interpretive services provider qualifications.
- Revised interpretive services codes and descriptions.
- New fees for interpretive services.
- Limits on interpretive services.
- Verification of interpretive services requirement.

Interpretive Services for Healthcare and Vocational Services

This policy applies to interpretive services provided for healthcare and vocational services in all geographic locations to injured workers and crime victims (collectively referred to as "insured") having limited English proficiency or sensory impairments; and receiving benefits from the following insurers:

- The State Fund (L&I),
- Self-Insured Employers or
- The Crime Victims Compensation Program.

This coverage and payment policy including new fees, codes, service descriptions, limits and provider qualification standards is effective on and after July 1, 2005.

Policy Does Not Apply to Interpretive Services for Legal Purposes

This coverage and payment policy does not apply to interpretive services for injured workers or crime victims for legal purposes, including but not limited to:

- Attorney appointments.
- Legal conferences.
- Testimony at the Board of Industrial Insurance Appeals or any court.
- Depositions at any level.

Payment in these circumstances is the responsibility of the attorney or other requesting party(s).

Why Are Interpretive Services Covered?

The United States Department of Health and Human Services Office of Civil Rights concluded that inadequate interpretation for patients with Limited English Proficiency is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964. More information about the Civil Rights Act is available on the web at http://www.hhs.gov/ocr/lep/ .

The Washington Workers' compensation law under RCW 51.04.030 (1) requires the provision of prompt and efficient care for injured workers without discrimination or favoritism. Therefore, interpretive services are covered so injured workers who have limited English proficiency or sensory impairments may receive prompt and efficient care.

Information for Healthcare and Vocational Providers

Insured individuals with limited English proficiency or sensory impairments may need interpretive services in order to effectively communicate with you. Interpretive services do not require prior authorization.

Under the Civil Rights Act, as the healthcare or vocational provider, **you** determine whether effective communication is occurring. If assistance is needed, then **you:**

- Select an interpreter to facilitate communication between you and the insured.
- Determine if an interpreter (whether paid or unpaid) accompanying the insured meets your communication needs.
- May involve the insured in the interpreter selection. **NOTE: Under the Civil Right Act, hearing impaired persons have the right to participate in the interpreter selection.**
- Should be sensitive to the insured's cultural background and gender when selecting an interpreter.

- The healthcare or vocational provider.
- Employee(s) of the healthcare or vocational provider whose primary job **is not** interpretation.
- Employee(s) of the healthcare or vocational provider whose primary job is interpretation but who is not a credentialed interpreter.

Persons Ineligible to Provide Interpretation/Translation Services

Some persons may not provide interpretation or translation services for injured workers or crime victims during healthcare or vocational services delivered for their claim. These persons are:

- The worker's or crime victim's legal or lay representative or employees of the legal or lay representative.
- The employer's legal or lay representative or employees of the employer's legal or lay representative.
- Persons under the age of eighteen (18). **NOTE: Injured workers or crime victims using children for interpretation purposes should be advised they need to have an adult provide these services.**

Persons Ineligible to Provide Interpretation/Translation Services at IME's

Under WAC 296-23-362 (3), "The worker may not bring an interpreter to the examination. If interpretive services are needed, the department or self-insurer will provide an interpreter." Therefore, at Independent Medical Examinations (IME), persons (including approved interpreter/translator providers) who may **not** provide interpretation or translation services for injured workers or crime victims are:

- Those related to the injured worker or crime victim.
- Those with an existing personal relationship with the injured worker or crime victim.
- The worker's or crime victim's legal or lay representative or their employees.
- The employer's legal or lay representative or their employees.
- Any person who could not be an impartial and independent witness.
- Persons under the age of eighteen (18).

Hospitals and Other Facilities May Have Additional Requirements

Hospitals, free-standing surgery and emergency centers, nursing homes and other facilities may have additional requirements for persons providing services within the facility. For example, a facility may require all persons delivering services to have a criminal background check, even if the provider is not a contractor or employee of the facility. The facility is responsible for notifying the interpretive services provider of their additional requirements and managing compliance with the facilities' requirements.

Fees, Codes and Limits

Why Is the Department Restructuring Fees and Codes?

A recent coverage and payment policy review showed the department's coding structure was not in line with interpreters' usual business practices. Therefore, the department decided the use of a single code for all payable services would work better for everyone. However, the department wanted to identify group services. So now there are two comprehensive codes for interpretive services—one for use with an ***individual*** client and one for use with multiple clients (***group***) at the **same** appointment.

In addition, the project's fee research showed the department was paying more than most other Washington State payers, who are paying between $30 and $50 per hour. The new coding structure includes all services; some of which the department had paid previously paid at $30 per hour. The fee reduction takes into account the increased billing at full rate for all covered service time.

By law, the department has a responsibility to control benefits costs for the employers and injured workers who pay the workers' compensation insurance premiums.

Why Can't L&I Pay Interpreters a Minimum Fee?

Only services which are actually delivered to injured workers can be paid. With a minimum fee, the insurer might make part of the payment for undelivered services. This would violate the department's responsibility to employers and injured workers who pay the industrial insurance premiums.

Further, under WAC 296-20-010(5) the insurer can pay only for missed insurer arranged IME appointments. If there was a minimum interpretive services fee, the insurer might pay for missed appointments arranged by healthcare or vocational providers or by the insured. This would conflict with the WAC. **However, mileage is payable for missed and/or IME no show appointments since the mileage service was an incurred prior to the missed appointment.**

Some Services Don't Require Prior Authorization

Direct interpretive services (either group or individual) and mileage do not require prior authorization on open claims. Providers can check claim status with the insurer prior to service delivery.

Services prior to claim allowance are not payable except for the initial visit. If the claim is later allowed, the insurer will determine which services rendered prior to claim allowance are payable.

Only services to assist in completing the reopening application and for an insurer requested IME are payable unless or until a decision to reopen is made. If the claim is reopened, the insurer will determine which other services are payable.

Services at Insurer Request and/or Requiring Prior Authorization

IME Interpretation Services

When an IME is needed, the insurer will schedule the interpretive services. Prior authorization is not required. The insured may ask the insurer to use a specific interpreter. However, only the interpreter scheduled by the insurer will be paid. Interpreters who accompany the insured, without insurer approval, will not be paid nor allowed to interpret at the IME.

IME No Shows

For State Fund claims, authorization must be obtained prior to payment for an IME no show. For State Fund claims contact the Central Scheduling Unit supervisor at 206-515-2799 after occurrence of IME no show. Per WAC 296-20-010 (5) "No fee is payable for missed appointments unless the appointment is for an examination arranged by the department or self-insurer."

Document Translation

Document translation services are only paid when performed at the request of the insurer. Services will be authorized before the request packet is sent to the translator.

Fees, Codes, Service Descriptions and Limits

The hourly fee for direct interpretive services (either group or individual) is being adjusted from $60 per hour to $48 per hour. The IME no show fee is a flat fee of $48. The mileage rate increased January 1, 2005 to 40.5¢ per mile (the state employee reimbursement rate). Document translation fee is now by report.

Limits in the L&I bill processing system will automatically deny services exceeding the maximum limit on a specific code or combination of codes. The following fees, service descriptions and limits on services apply **to services on and after July 1, 2005**:

Code	Description	How to Bill	Maximum Fee	L&I Code Limits
9988M	**Group interpretation** direct services time between two or more client(s) and healthcare or vocational provider, includes wait and form completion time, time divided between all clients participating in group, **per minute**	1 minute equals 1 unit of service	$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9989M	**Individual interpretation** direct services time between one insured client and healthcare or vocational provider, includes wait and form completion time, **per minute**	1 minute equals 1 unit of service	$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9986M	**Mileage, per mile**	1 mile equals 1 unit of service	State employee reimbursement rate (as of January 1, 2005 rate is 40.5¢ per mile)	Does not require prior authorization. Mileage billed over 200 miles per claim per day will be reviewed.
9996M	**Interpreter " IME no show"** wait time when insured does not attend the insurer requested IME, **flat fee**	Bill 1 unit only	Flat fee $48	Payment requires prior authorization--Contact Central Scheduling Unit after no show occurs. Contact number: 206-515-2799. Only 1 no show per claimant per day.
9997M	**Document translation** at insurer request	1 page equals 1 unit of service	BR	Requires prior authorization, which will be on translation request packet. Services over $500 per claim will be reviewed.

Covered and Non-covered Services

Covered Services

The following interpretive services are covered. When billed, payment is dependent upon service limits and department policy. Interpretive services providers may bill the insurer for:

- Interpretive services which facilitate communication between the insured and a healthcare or vocational provider.
- Time spent waiting for an appointment that does not begin at time scheduled (when no other billable services are being delivered during the wait time).
- Assisting the insured to complete forms required by the insurer and/or healthcare or vocational provider.
- A flat fee for an insurer requested IME appointment when the insured does not attend.
- Translating document(s) at the insurer's request.
- Miles driven from a point of origin to a destination point and return.

Non-covered Services

The following services are not covered and may not be billed to nor will they be paid by the insurer:

- Services provided for a denied or closed claim (except services associated with the initial visit for an injury or crime victim or the visit for insured's application to reopen a claim).
- Missed appointment for any service other than an insurer requested IME.
- Personal assistance on behalf of the insured such as scheduling appointments, translating correspondence or making phone calls.
- Document translation requested by anyone other than the insurer, including the insured.
- Services provided for communication between the insured and an attorney or lay worker legal representative.
- Services provided for communication not related to the insured's communications with healthcare or vocational providers.
- Travel time and travel related expenses, such as meals, parking, lodging, etc.
- Overhead costs, such as phone calls, photocopying and preparation of bills.

Interpreter Organizations

Several interpreter and translator professional organizations have information and educational opportunities for interpretive services providers. Their websites are listed below. This list is neither comprehensive nor an endorsement of any of these organizations. It is provided for informational purposes.

Organization	Website	Phone
Northwest Translators and Interpreters Society	www.notisnet.org	206-382-5642
Society Of Medical Interpreters	www.sominet.org	206-729-2100
National Association of Judiciary Interpreters and Translators	www.najit.org	206-267-2300
Washington Interpreters and Translators Society	www.witsnet.org	206-382-5690
Washington State Registry of Interpreters for the Deaf	www.wsrid.com	No number listed
National Council on Interpreting in Healthcare	www.ncihc.org	FAX 707-541-0437

L&I Publications

L&I publishes several handbooks and pamphlets related to the Workers' Compensation and Crime Victims Program. Some of them are available in Spanish and other languages.

Provider related publications can be downloaded or ordered at
http://www.LNI.wa.gov/ClaimsIns/Providers/FormPub/Pubs/default.asp

Workers' compensation related publications can be downloaded or ordered at
http://www.LNI.wa.gov/ClaimsIns/Claims/FormPub/Pubs/default.asp

Crime Victims Program related publications can be downloaded or ordered at
http://www.LNI.wa.gov/ClaimsIns/CrimeVictims/FormPub/default.asp

Laws and Rules Relating to Interpretive Services

The following laws and rules contain relevant information for interpretive services providers and can be accessed at the Washington State Legislature's website http://www1.leg.wa.gov/LawsAndAgencyRules/. Links to these laws and rules are located at the L&I home page http://www.LNI.wa.gov/.

RCW Chapter 5.60	Witnesses—Competency
RCW 2.43.010	Right to Interpreter Services in Legal Proceedings
RCW 51.04.030 (1)	Medical Aid Rules
RCW 51.28.030	Medical Aid Fund
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who may treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-02700	Medical Coverage Decisions
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-362	May a worker bring someone with them to an Independent Medical Examination (IME)?
GR 11.1	Code of Conduct for Court Interpreters
RCW Chapter 5.60	Witnesses

APPENDIX E

ATTACHMENT 1

FILED ENTERED
LODGED RECEIVED

MAR 12 1991

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

FILED ENTERED
LODGED RECEIVED

MAR 4 1991

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON

SEATTLE, WASHINGTON

LUISA REYES and SALVADOR PENADO, on behalf of themselves and other similarly situated

Plaintiffs,

vs.

RICHARD THOMPSON, Secretary, STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendant.

NO: C91-303

CLASS ACTION

STIPULATION, AGREEMENT OF SETTLEMENT AND CONSENT ORDER

THIS MATTER COMES BEFORE THIS COURT by an agreement of the parties. Plaintiffs, represented by Sandra Fancher, Kelly Owen, John Hughes, and Gillian Dutton, of Evergreen Legal Services (ELS) and Defendant, Washington State Department of Social and Health Services, Division of Economic and Medical Field Services, (hereinafter referred to as DSHS) represented by Charles Murphy, Assistant Attorney General, hereby stipulate to the conditions below as disposition of this matter and to entry of this Order.

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This is a class action by Plaintiffs who are limited-English proficient (LEP) and who seek declaratory and injunctive relief requiring DSHS to provide them with information, notice and services concerning public assistance benefits in their primary languages, in accordance with Title VI of the Civil Rights Act of 1964, the Title VI regulations, Office of Civil Rights Agreements made by DSHS pursuant to Title VI, federal statutes and the United States Constitution.

This agreement specifies further actions which will be taken by DSHS to provide services in accordance with Title VI of the Civil Rights Act of 1964, the Title VI regulations, Office of Civil Rights Agreements made by DSHS pursuant to Title VI, federal statutes and the United States Constitution. DSHS by consenting to this agreement intends to obligate only the Division of Economic and Medical Field Services and its program responsibilities to those requirements contained in this agreement.

Having reviewed the record in this matter, IT IS HEREBY ORDERED that:

1. As stipulated herein, Plaintiffs bring this action under Federal Rule of Civil Procedure 23(b)(2) on behalf of themselves and all similarly situated applicants for public assistance within the State of Washington. Plaintiffs proceed with this action on behalf of a plaintiff class defined as follows:

> All persons of limited English-language proficiency who have applied for or received or will apply for or receive public assistance benefits within Wash-

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ington State since October 1, 1987. Public assistance is defined as services and notices provided by DSHS Economic and Medical Field Services, including but not limited to Aid to Families with Dependent Children, Family Independence Program, Food Stamps, General Assistance, medical assistance, refugee assistance, and consolidated emergency assistance program.

2. Based upon the stipulation of the parties, all the elements of a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2) are met. There are approximately 14,000 cases of families and individuals who are limited-English proficient and who currently receive benefits from the Division of Economic and Medical Services during any given month. In addition, there are many other people who will be eligible for benefits in the future. The class is so numerous that joinder of all members is impracticable.

3. There are questions of law and fact common to the class; namely, whether DSHS's policies, practices, and procedures violate federal law and constitute a breach of contract which DSHS entered into pursuant to Title VI regulations. Additionally, the claims of the representative plaintiffs are typical of the claims of the class. The named plaintiffs will fairly and adequately represent the interests of the class.

4. The parties agree that this agreement does not constitute an admission by DSHS of any violation of the Departmental Regulation issued pursuant to Title VI of the Civil Rights Act of 1964, or Section 504 of the Rehabilitation Act of 1973. The parties further agree that DSHS intends to act in full and complete compliance

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with Title VI, Section 504 and all agreements made with the Office of Civil Rights.

5. DSHS has entered into agreements with the United States Office of Civil Rights, Department of Health and Human Services, on October 21, 1983 and June 12, 1987. These agreements, entitled "Predetermination Settlement Agreement" and "Predetermination Settlement Amendment" respectively, outline DSHS' Division of Economic and Medical Services' responsibilities to provide notice and service to LEP applicants and recipients. These Agreements are attached as Exhibit A and B, respectively, and all terms and provisions are incorporated by reference into this Consent Decree.

6. As a consequence of this agreed consent order, it is understood that the costs, fees and attorney fees of the parties will be borne by each party and no claims will be made against the other party for said costs, fees or attorney fees.

DEFINITIONS

7. The following definitions are used in this agreement:

a. LIMITED ENGLISH PROFICIENT: any person whose primary language is not English;

b. PRIMARY LANGUAGE: the language in which a person indicates he or she is most proficient;

c. COMPUTER-GENERATED NOTICES: notices that are generated and mailed to class members by a computerized system at DSHS' state office level. These include, but are not limited to, eligibility review forms, monthly reports, earned income reports, and termination and denial letters;

d. ADVERSE ACTION: the denial, termination, suspension, or reduction of benefits or services,

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or the withdrawal of an application for benefits;

e. INADEQUATE NOTICE: notice given to a LEP applicant/recipient in English or an incomplete or incorrect translation. A notice is incomplete or incorrect if the translation of the material is not thorough and precise, adds or omits anything which changes the meaning and does not state as nearly as possible what has been stated in English, giving considerations to variations in grammar and syntax for both languages. The translation must use the same reading level of language as the English, at a sixth grade level or below; and

f. MAJOR WRITTEN COMMUNICATION: a notice or form that requests information from an applicant/recipient, requires a response on the part of an applicant/recipient, or notifies an applicant/recipient of an adverse action.

IDENTIFICATION OF LEP APPLICANTS/RECIPIENTS

8. RELEVANT OCR PROVISION:

DSHS will computer identify all LEP persons by name, case number, and primary language to ensure that information can be retained and appropriate bilingual services can be provided at the State Office and CSO levels.

DSHS shall monitor to ensure that LEP clients are correctly identified as such.

9. DSHS shall ensure that class members are correctly identified in its records by inquiring about client language preference on forms used:

a. At each request for services made through the use of the Reception Slip;

b. At each regular Eligibility Review; and

c. At each request for assistance.

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10. DSHS will identify each LEP client by case name and primary language on the computer-generated lists provided to each CSO, including but not limited to the following:

a. The quarterly listing of LEP clients. This list will be produced monthly upon completion of computer reprogramming;

b. Monthly list of redirected warrants;

c. Monthly list of clients required to participate in any monthly reporting of income; and

d. Monthly list of clients receiving computer generated termination notices. (DSHS 8-183, 8-183A, and 8-183B)

NOTICES AND FORMS

11. RELEVANT OCR PROVISION:

Forms that request information or require a response from the client involving denial, termination or reduction of benefits, and forms advising the client of denial, termination, or reduction of benefits will be translated fully, except for DSHS 8-183. Any fill-in spaces in the primary-language forms or notices must be completed in the appropriate primary language.

12. a. Every LEP client has the right to notice in their primary language without significant delay. Nothing in this section shall relieve DSHS from its obligations under the OCR Agreement and Amendment to provide appropriate notices regardless of whether the primary language is one of the six most common languages.

b. In order to insure that LEP clients receive notices in their primary language without significant delay, DSHS shall adopt a policy of simultaneous issuance of English and the corres-

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ponding non-English written communications for the five other most common languages, unless there is an emergent situation.

c. In particular, computer-generated notices and forms meeting the major communication definition, including DSHS 8-183, will be simultaneously generated in the six most common languages: English, Spanish, Vietnamese, Cambodian, Laotian, and Chinese. For all other LEP clients, DSHS will by March 1, 1991 establish a standardized procedure to provide a translated notice in the appropriate language.

d. When there is an emergent situation, DSHS may issue the English version first, but it must provide LEP clients the corresponding translation or summary as required by the OCR Agreements without significant delay. Producing translations through this emergent process may include, at DSHS discretion, elimination of the three week translation evaluation process as outlined in the OCR agreement and the use of a more streamlined translation and printing process than is used for the English version.

e. An emergent situation is one where a court order or federal law requires DSHS to issue a form or notice in less than 60 days from the date the English text is finalized.

13. DSHS has established and will maintain a process between the CSOs and contracted translators or bilingual staff in order to provide speedy written translations when other methods would be slower in providing services to LEP applicants/recipients. Use of

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the process does not excuse DSHS from providing services "without significant delay" as obligated by the OCR agreements.

MONITORING AND COMPLIANCE

14. RELEVANT OCR PROVISION:

DSHS will develop and implement a system to monitor and evaluate the implementation and effectiveness of the procedures established for providing bilingual services.

Monitoring shall include on-site monitoring by DSHS' bilingual services coordinator of CSOs with LEP populations.

15. DSHS shall implement a self-audit procedure at each CSO with an LEP client population by March 1, 1991. The auditing shall be as follows:

a. A mandatory self-audit shall be completed monthly by each CSO reviewing 10% of its LEP caseload, or 50 LEP case records where the CSO has an LEP caseload of over 500. A minimum of 3 cases or all the CSO's LEP cases shall be audited, whichever is less;

i. The first audit shall review each file's prior six months of services and each additional audit will review back to the last audit date;

ii. DSHS shall direct each CSO to audit different cases each month to ensure that the maximum possible number of different cases are audited annually.

b. As part of the 10% audit, each CSO shall audit all LEP cases closed that month;

c. The LEP case record audit will include case record identification, language preference, computer coding, documentation of interpreter usage, documentation of actual numbers of translated and non-translated written communications, and corrective action taken, if required;

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d. Each CSO will collect and report findings quarterly to the regional administrator and to the Economic and Medical Services LEP program manager;

e. DSHS will use this audit to take immediate corrective action on individual cases where inadequate notice has been provided. Lost benefits will be issued within 5 working days; and

f. This self-audit report shall contain the same content as Exhibit C, attached to this Consent Order. Substantial changes in content shall not be made unless agreement is reached between the parties. The self-audit report shall be reviewed in the annual compliance review conducted pursuant to paragraph 17, infra.

16. Mandatory quarterly reviews of the results of the monthly self-audits shall be completed by regional staff as follows:

a. The results of monthly audits shall be summarized;

b. Auditors will check for required posters and forms in the reception area, use of translated forms throughout the office, bilingual staffing formulas and accomplishments, LEP training information, documentation of LEP client complaints, contact with community groups to obtain input on bilingual services compliance, delays in processing applications for LEP clients, and documentation of corrective actions taken by the CSO based on the quarterly review;

c. The quarterly audits will be reported to the CSO administrator, regional administrator, director of EMFS, Evergreen Legal Services, and the EMFS LEP program manager. Results will be used to monitor compliance and to evaluate training needs; and

d. This quarterly report shall contain the same content as Exhibit D, attached to this Consent Order. Substantial changes in content shall not be made unless agreement is reached between the parties. The quarterly report shall be reviewed in the annual compliance review conducted pursuant to paragraph 17, infra.

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17. Both parties agree that the level of auditing set forth in paragraphs 15 and 16, supra, shall continue for at least one year from the date of implementation. After one year from the date of the signing of this order, the parties shall meet to review the effectiveness of this procedure in complying with the provisions of the OCR agreements and this consent order.

18. Within 270 days of entry of this consent decree, DSHS will develop and implement a statewide policy on continued monitoring for provision of bilingual services without significant delay. The self-audit process for monthly and quarterly monitoring, referenced in paragraphs 15 and 16, supra, will provide the required monitoring for provision of bilingual services for at least the first year of this consent decree. Following the discontinuation of the Self-Audit process, a monitoring process as described below will be implemented. This policy will include:

a. Monitoring CSO records for provision of:

i. translated written communication;

ii. correct LEP identification;

iii. delays in assistance and provision of bilingual services due to the time needed for translation of notices; and

iv. use of bilingual staff or interpreters.

b. Monitoring CSO reception areas for the required LEP poster, provision of translated forms and pamphlets, and for correct identification procedures for LEP clients;

c. At least quarterly monitoring of management reports for delays in disposition of applications for assistance, comparing the application disposition dates for the English versus the non-English applicant;

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d. At least quarterly monitoring of percentage of LEP clients versus the number of bilingual staff to ensure adequate delivery of bilingual services;

e. Monitoring of client complaints related to inadequate service because of a language barrier. This monitoring will include such items as contacts with community based organizations which serve these LEP populations, client contact, and a means of telephonic access by LEP clients which allows clients to make complaints in their primary language; and

f. A corrective action process which will provide monitoring results and corrective action plans to Regional Administrators, the EMFS Director and the EMFS LEP Program Manager where significant delay or inadequate services are found.

19. The results of this monitoring and corrective action taken will be documented in the CSO quarterly audit reports and will be shared with Evergreen Legal Services for the period specified in paragraph 34.

ONE-TIME CORRECTIVE ACTION FOR CLASS MEMBERS
GENERAL REQUIREMENTS

20. DSHS shall provide a one-time opportunity for class members to request a case review and receive restored benefits for any past benefits lost due to English-only, incomplete or incorrectly translated notices. Lost benefits may be recovered back to October 1, 1987.

21. DSHS shall determine restored benefits based on the class member's receipt of inadequate notice and eligibility for benefits at the time adverse action was taken. Benefits will be restored for the period of time the class member was eligible.

22. To provide this opportunity for benefits, DSHS shall inform class members of the settlement of this lawsuit and the pro-

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cedures for corrective action required by this lawsuit as set forth in paragraph 33.

REQUESTS FOR RECORD REVIEW

23. Any class member may request a full record review by DSHS to determine whether that person has lost benefits as a result of having been issued improper notice. Upon the class member's request, DSHS shall review that person's DSHS records back to October 1, 1987 to determine whether compensation is due.

24. Class members shall have 90 days from the last day notice is posted in DSHS' Community Service Offices as described in paragraph 33, infra, to request a DSHS record review.

DETERMINATION OF ELIGIBILITY FOR LOST BENEFITS

25. DSHS agrees to review each record as identified in paragraph 22, for adverse actions taken since October 1, 1987 upon request by a class member.

a. Each notice of adverse action will be reviewed to determine if adequate notice was provided to the class member;

b. Where adequate notice was not provided and the adverse action taken was based on verified ineligibility, DSHS will provide the class member with a notice explaining the outcome of the case review and a corrected notice of the adverse action in the primary language. This notice shall include the class member's right to a fair hearing upon the adverse action within 90 days following the issuance of the corrected notice;

c. If the adverse action notice was originally preceded by a request for information, DSHS shall provide that request for information in the client's primary language, along with a notice explaining the outcome of the case review. This notice will advise the client of acceptable verifi-

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cation needed to redetermine eligibility and to contact the CSO for assistance in obtaining verification, if necessary;

d. DSHS will make every reasonable effort to assist class members in providing requested verification including advance payment of verification fees as described in Manual F, Chapter 9.30. DSHS will follow October 1, 1990 reduced verification requirements contained in Manual F, Chapter 9, the Food Stamp Program Manual, Chapter 4 and interim notice FSP 84, and the FIP Manual, Chapter 5. Using the prudent person concept in determining eligibility, DSHS will accept and consider unofficial documents, documents derived from other records and other written statements from a knowledgeable third party or a class member. In determining whether the prudent person would accept proffered verification, DSHS will consider the difficulty of finding other forms of verification in light of the amount of time elapsed since the date of eligibility at issue. Prior to denial for lack of sufficient verification needed to determine eligibility, the case will be reviewed at the supervisory level to assure all options have been explored;

e. A class member's delay in providing verification will not result in eligibility being denied;

f. Lost benefits will be restored for periods of eligibility. Eligibility or ineligibility shall be determined for each occurrence of adverse action and benefits will be paid for the period of time the class member was eligible. For the purposes of retroactive benefits, no person shall have his or her assistance automatically reinstated prior to a determination of eligibility for that period;

g. Each class member requesting a file review under this provision shall receive notice from DSHS of the determination. This notice shall be mailed no later than 60 days from the date of the record review request except where the class member is unable to supply requested verification within the 60 days. The notice shall inform the class member of his or her right to request a fair hearing within 90 days of the date of the notice; and

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h. DSHS will restore lost benefits within five working days of the determination that benefits are due. Retroactive benefits received pursuant to this order shall be disregarded as income and resources for purposes of determining eligibility and need for AFDC, FIP (except FIP Food Assistance), General Assistance, Refugee Assistance and medical assistance programs. Retroactive benefits received pursuant to this order shall be disregarded as income for purposes of determining eligibility and need for Food Stamps and FIP Food Assistance.

CONTINUING CORRECTIVE ACTION FOR LEP APPLICANTS/RECIPIENTS

26. Within 60 days of entry of this consent decree, DSHS -- Economic and Medical Field Services (EMFS) will issue a directive to all CSOs to assure that there is no delay in providing services to or correcting improper adverse action taken against class members who have received improper notice. These measures shall be instituted whenever DSHS-EMFS discovers inadequate notice, whether through client complaint, the self-audit process or other means. These measures shall include:

a. CSOs shall establish an office procedure for expeditious resolution of cases involving inadequate notice. Resolution will require offering the class member the option of scheduling an appointment by the end of the next working day following the day the class member informs DSHS that he or she received an inadequate notice. The purpose of the appointment shall be to provide the class member with a written translation of the communication and allow the class member an opportunity to provide requested verification. At the class member's option, DSHS may provide him or her with an adequate notice within 24 hours of the complaint in lieu of an appointment. DSHS shall take any other actions necessary to avoid delay in the class member's receipt of benefits;

b. CSOs shall apply the rules of "advance and adequate notice", per WAC 388-33-376 and 388-49-015 (8) and

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388-49-600. If benefits have been adversely affected without proper notice, the class member must be offered the option of reinstating benefits to the prior level. Any assistance received during this period may be an overpayment if the class member is determined to have been ineligible; and

c. For each finding of inadequate notice the CSO shall review the case records back to the date of the last audit, if any, and restore lost benefits to the applicant/recipient for any eligibility during that period.

27. DSHS shall review the case records of class members after termination has been proposed and prior to actual closure of the case for any reason, to determine whether the notice informing the client of adverse action and any notices requesting information or action were in the class member's primary language. Where notice was not provided in the primary language, DSHS shall not terminate benefits prior to issuing notice in the primary language and allowing adequate and advance notice.

QUALIFIED BILINGUAL STAFF AND INTERPRETERS

28. RELEVANT OCR PROVISION:

DSHS will develop and implement a statewide procedure of recruiting and hiring bilingual employees at the CSOs. Each CSO shall, through attrition, employ bilingual personnel to serve LEP applicants/recipients sharing the same language when the number of those individuals served by a CSO client contact job classification equals or exceeds 50 percent of the average caseload of a full-time position in such a classification.

29. RECRUITMENT AND HIRING OF BILINGUAL STAFF:

Within 180 days of entry of this consent decree, DSHS will develop and implement a statewide policy on recruiting and hiring bilingual staff with such items as:

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a. Instructions for calculation of the 50% rule for hiring bilingual staff;

b. Instructions for evaluation of management reports which collect information on the number of LEP clients and the disposition of initial applications;

c. Guidelines for hiring additional bilingual staff and interim instructions for providing services without significant delay to LEP clients when additional staff are needed as indicated by the 50% calculation or evidence of the occurrence of significant delay;

d. Guidelines for prioritizing the use of bilingual staff and contracted interpreters for effective provision of bilingual services; and

e. Guidelines which outline the hiring procedure for both bilingual staff and contracted interpreters. These guidelines shall include:

i. Testing requirements related to hiring;

ii. Certification requirements for particular positions;

iii. The rating system used for certification; and

iv. The list of acceptable certifications including the DSHS-administered Fluency test.

TESTING

30. RELEVANT OCR PROVISION:

DSHS will ensure that all interpreters and bilingual workers are fluent in English and a primary non-English language. DSHS shall develop standards of testing, oral and written, to ensure that all interpreters and bilingual workers meet the standard. Testing shall include evaluation of the language competence, interpreter skills, understanding of DSHS policies regarding confidentiality, DSHS forms and the role of interpreters.

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NORTH CENTRAL REGIONAL OFFICE
CONDON BUILDING, SUITE A-2
200 PALOUSE STREET
P.O. BOX 158
WENATCHEE, WA 98807-0158
(509) 662-9681

31. DSHS will promptly develop and implement a statewide policy which describes the use of fluency testing for bilingual staff and contracted interpreters/translators. This test is being developed and will be administered by DSHS, Administrative Services, Language Interpreter Services and Translations (LIST) section. DSHS will make a good faith effort to expedite the acceptance of fluency testing by its employees' union. As soon as the test is validated and approved, DSHS will begin testing of contracted interpreters and translators and bilingual staff in the five primary languages of Spanish, Vietnamese, Cambodian, Laotian and Chinese.

This policy will include such items as:

a. Requirements for both oral and written fluency tests;

b. Emphasis on the preference for bicultural, as well as bilingual staff, to assure effective communication through an understanding of non-verbal and cultural patterns; and

c. Guidelines for provision of bilingual services without delay when an employee or contracted interpreter fails the testing process.

Implementation Schedule: (Dependent on negotiation with employees' union by 12/31/90).

The testing procedure was submitted for negotiation to the employee's union on October 8, 1990.

Validation of the test is expected to begin by December 15, 1990.

The scheduled date for beginning the administration of tests is March 1, 1991.

The scheduled date for completion of testing of EMS bilingual staff and contracted interpreters/translators in the five primary languages is September 1, 1991.

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P.O. BOX 158
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(509) 662-9681

The scheduled date for beginning to administer the written tests for languages other than the five primary is one year from the date of acceptance by the union.

TRAINING

32. RELEVANT OCR PROVISION:

A position shall be created in the Division of Economic and Medical Services. The responsibilities of this position will include the following:

a. Supervision of the provision of interpreter, bilingual worker, and translation services;

b. Provision of training and new employee orientation regarding bilingual services requirements and sensitivity to the special needs of LEP persons;

c. Development of testing and hiring criteria for interpreters and bilingual DSHS workers;

d. Conducting monitoring of bilingual services in the various CSOs; and

e. Assisting the CSOs to effectively use the bilingual capabilities of bilingual staff.

33. Within 30 days of entry of this consent decree, DSHS will establish a statewide training packet and policy for the provision of bilingual services. Within 180 days of implementation of this policy, all bilingual staff and contracted interpreters/translators will be trained. This training package and policy will include:

a. Requirements for training all bilingual staff and contracted interpreters on:

i. DSHS policies regarding the interpreter code of ethics and the importance of confidentiality;

ii. DSHS forms; and

iii. The role of the interpreter.

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NORTH CENTRAL REGIONAL OFFICE
CONGDON BUILDING, SUITE A-2
200 PALOUSE STREET
P.O. BOX 158
WENATCHEE, WA 98807-0158
(509) 662-9601

b. Refresher training requirements for all staff and contracted interpreters, to maintain knowledge in the items outlined in the initial training; and

c. As training becomes available through the Minority Affairs Initiative, bilingual staff and contracted interpreters will be trained concerning multicultural sensitivity education and non-verbal and cultural patterns of communications.

NOTICE OF CONSENT AGREEMENT

34. Pursuant to Federal Rule of Civil Procedure 23(e) and within 180 days of the date of this order, DSHS shall publish notice of this agreement.

a. The contents will include notice of:

i. the client's right to notices in the language he or she chooses;

ii. the client's right to receive any benefits lost because of inadequate notice;

iii. the client's right to request that his or her case be reviewed to determine whether lost benefits are owed to them;

iv. the client's right to a fair hearing if he or she disagrees with the results of the case review; and

v. a summary of the procedures resulting from this settlement.

b. DSHS shall distribute this notice as follows:

i. Send a notice (See Exhibit E) to all LEP applicants/recipients who have applied for or received benefits from DSHS since October 1, 1987;

ii. Send a notice to community-based organizations serving the LEP population in each CSO service area;

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NORTH CENTRAL REGIONAL OFFICE
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P O BOX 158
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(509) 662-9681

iii. Post in each CSO, outstations, and satellite offices translated notices (attached as Exhibit F) for one year; and

iv. Publish once a week for three consecutive weeks in each of the newspapers listed in Exhibit G. The contents of this notice shall be agreed on by the parties.

COMPLIANCE REQUIREMENTS

35. DSHS and Evergreen Legal Services will annually and mutually review compliance with this Consent Agreement for three years. Monitoring reports will be shared with Evergreen Legal Services for this same three year period.

36. The parties recognize that unforseen circumstances may give rise to a need for amendments to this consent agreement. In this event, both parties agree to negotiate, in good faith, amendments which may be necessary.

DATED this 12th day of March, 1991.

Thomas S Zilly
JUDGE/COMMISSIONER

Presented by:

EVERGREEN LEGAL SERVICES

Kelly Owen
KELLY OWEN
Attorney for Plaintiffs

3/1/91
Dated

Gillian Dutton
GILLIAN DUTTON
Attorney for Plaintiffs

SANDRA FANCHER
Attorney for Plaintiffs

JOHN HUGHES
Attorney for Plaintiffs

1/15/91

Approved for Entry and Notice of Presentation waived:

ROBERT LOLCAMA
Assistant Secretary
Economic and Medical Services

2/1/91
Dated

CAROL B. FELTON
Director
Economic and Medical Field Services

2/1/91
Dated

OFFICE OF THE ATTORNEY GENERAL

CHARLES MURPHY
Assistant Attorney General
Attorney for Defendant

FEB 1, 91
Dated

APPENDIX F

WAC 263-12-097
Interpreters.

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2.

(2) The provisions of General Rule 11.3 regarding telephonic interpretation shall not apply to the board's use of interpreters.

(3) The industrial appeals judge shall make a preliminary determination that an interpreter is able to accurately interpret all communication to and from the impaired or non-English-speaking person and that the interpreter is impartial. The interpreter's ability to accurately interpret all communications shall be based upon either (a) certification by the office of the administrator of the courts, or (b) the interpreter's education, certifications, experience, and the interpreter's understanding of the basic vocabulary and procedure involved in the proceeding. The parties or their representatives may question the interpreter as to his or her qualifications or impartiality.

(4) The board of industrial insurance appeals will pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1). When a party or person for which interpretive services were requested fails to appear at the proceeding, the requesting party or the party's representative may be required to bear the expense of providing the interpreter.